Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-421

FRED IMBERT, INC.,
PETITIONER,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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COMPAGNIE GENERALE TRANSATLANTIQUE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Fred Imbert, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 29, 1975.

Opinions Below

The opinion of the Court of Appeals, not yet reported, is appended to this petition as provided in U.S. Sup. Ct. Rule 23.(i). The Memorandum Decision and Order by

Hon. Charles L. Powell, filed and entered August 13, 1974, which denied respondent's post-trial motions, are also appended.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on May 29, 1975. A timely petition for rehearing was denied without opinion on June 20, 1975. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

I. Whether the First Circuit Court of Appeals improperly held that any contributory negligence of the injured longshoreman results automatically in the awarding of full indemnity, as a matter of law, as has been decided by the Second, Fourth, and Ninth Circuit Courts of Appeal, or whether it is merely "a factor" to be considered in determining the issue of indemnity as resolved by the Third and Fifth Circuit Courts of Appeals?

II. Whether petitioner's right to a jury trial under the Seventh Amendment to the United States Constitution has been nullified by the Court of Appeals reversal; and whether the Court of Appeals committed basic error in searching the record for conflicting circumstantial evidence in order to take the case away from the jury?

Statement of the Case

Jurisdiction in the United States District Court, District of Puerto Rico, was based on diversity of citizenship. Ruben Santiago Martinez, a Puerto Rico longshoreman,

sued respondent, a foreign vessel owner, for personal injuries. The vessel impleaded the longshoreman's employer (petitioner), seeking indemnity. Plaintiff recovered a verdict of $90,000.00 following a 12-day trial before a court and jury. The jury also returned a verdict in favor of petitioner on the third party cause of action. These were general verdicts to which no exceptions were taken. No special interrogatories were requested by any party.

Post-Trial motions by the vessel owner were denied by the trial judge, Hon. Charles L. Powell, in the decision appended hereto. Judgment in favor of plaintiff and in favor of petitioner was dated December 13, 1973 and was entered on December 20, 1973. Respondent appealed.

The Court of Appeals reversed that portion of the judgment which denied indemnity to the vessel, holding that in its view of the evidence, "it is entirely possible that the jury found the longshoreman contributorially negligent," and if so, any such contributory negligence automatically results in indemnity against petitioner unless "conduct precluding" were also found. The case was remanded for a new trial.

Petitioner sought rehearing by a petition timely filed. The petitioner was denied. Certiorari is timely sought.

Argument

POINT I. THE ISSUE PRESENTED FOR REVIEW INVOLVES AN IMPORTANT QUESTION OF FEDERAL MARITIME LAW, VIZ., THE LEGAL EFFECT OF A FINDING OF CONTRIBUTORY NEGLIGENCE OF A LONGSHOREMAN, DECISIONS ON WHICH ISSUE ARE IN CONFLICT IN VARIOUS CIRCUIT COURTS OF APPEALS.

The Court of Appeals decision is in conflict with decisions of other Courts of Appeals on this same matter and it has decided an important question of federal law which

has not been, but should be, settled by this Court, viz., the legal effect of a finding of contributory negligence of a longshoreman.

This conflict is conceded by the Court of Appeals opinion itself, where it is written:

> "This dispute is whether a longshoreman's contributory negligence automatically establishes breach by the longshoreman's employer of its warranty of workmanlike performance. In the Fifth Circuit it appears that contributory negligence by a longshoreman does not necessarily amount to breach of warranty by the stevedore. Instead, the longshoreman's contributory negligence is regarded as one consideration in determining whether the stevedore breached its warranty. • • • It appears that the Third Circuit accepts this approach also. • • • In the Second, Fourth, and Ninth Circuits the rule is that contributory negligence by the longshoreman within the scope of his employment is imputed to the stevedore. • • • This also may be the rule in the Sixth Circuit. • • •" (Citations omitted.)

Julian v. *Mitsui O.S.K. Lines, Ltd.*, 479 F.2d 432 (5 Cir.), cert. denied sub nom. *Mitsui O.S.K. Lines, Ltd.* v. *Strachan Shipping Co.*, 414 U.S. 1093 (1973) is one of the principal conflicting decisions. *Julian* also recognizes the conflict on this precise issue, in these words (pages 433-434 of 479 F.2d):

> "The rule in this Circuit is that contributory negligence '. . . is a factor to be taken into consideration on the issue of breach of the contractor's (stevedore's) implied warranty'."

> "We are asked to reconsider our position in light of the rule prevailing in the Second, Fourth, and Ninth Circuits, that any contributory negligence on behalf of the longshoreman is imputed to the stevedore and constitutes a breach of the stevedore's warranty as a matter of law . . ." (Citations omitted.)

Harnett v. *Reiss Steamship Co.*, 421 F.2d 1011 (2 Cir.) was relied upon by the Court of Appeals in the case at bar, to support its "automatic indemnity" holding. However, even *Harnett* recognizes the need for Supreme Court clarification, stating at page 1018:

> "The argument was made in *McLaughlin* that mechanical application of the rules of indemnity led there to an irrational result. At first blush, the same claim might be made here; it does seem strange that conduct by a Grain Handling employee which deviated only minimally (1%) from the norm should subject his employer to potentially full liability. To this argument, it might be enough to recall that the eccentricities of the law in this area were explored thoroughly in *McLaughlin*, where we concluded that attempts to make it more rational should be left to the Supreme Court or Congress."

As if to heighten the conflict, the Second Circuit recently retreated from its own "automatic" doctrine (*Nye* v. *A/S D/S Svendborg*, 501 F.2d 376, cert. den. U.S.). Nye was found guilty of 50% contributory negligence and be reason of this the employer was held to have breached its warranty by the district judge. The Second Circuit affirmed the 50% contributory negligence, but reversed the indemnity judgment and dismissed the shipowner's third party action, holding this did not amount to a breach.

Succinctly stated, the reason the "automatic" rule is erroneous is as follows: the jury was properly instructed that if it found contributory negligence, it must reduce any verdict by the appropriate percentage. Therefore, if contributory negligence was found, no award was made for any money damages resulting from plaintiff's own neglect. There is no loss to be passed on to the shipowner. Under the doctrine of comparative negligence the plaintiff purged himself, and those damages were *excised* from the case. There is hence no remaining consequence, in terms of money damages, of such negligence. Therefore it should play no part in adjudicating the third party cause of action. Any amount which the court adjudged the vessel liable to pay the plaintiff must be assessed on a basis *other than* contributory negligence.

In November, 1972 the Longshoremen's and Harbor Workers' Compensation Act Amendments became effective and in time, *in the States,* the importance of this issue may diminish. However, in Puerto Rico it will not diminish. These Amendments do not apply to Puerto Rico, which has its own, separate Act, viz., the Puerto Rico Workmen's Accident Compensation Act, (11 LPRA 1, et seq.) which has not been amended. In Puerto Rico, the "automatic indemnity" issue will continue, until resolved, to create uncertainties in the court's charges to the jury and to *hobble settlement negotiations* in all cases.

Also, no matter what effect the Amendments have on Stateside cases, this does not affect a court's duty to correctly decide this case.

Although the Court of Appeals judgment would require a new trial, this is nevertheless an important and clear-cut issue of law fundamental to the further conduct of the case, that would otherwise qualify as a basis for certiorari. If the "factor" rule, as charged by District Judge Powell, is the correct rule, then the jury verdict in favor of petitioner

had proper support and this old, 1968-accident case would terminate now by reversal and re-establishment of the jury's verdict.

> "[W]here there is some important and clearcut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status (citing cases)." *Supreme Court Practice,* Stern and Gressman (Fourth Ed., 1969).

In *A. & G. Stevedores* v. *Ellerman Lines,* 369 U.S. 355 (1962), the Supreme Court granted certiorari on the petition of the stevedore whose jury verdict had been reversed by the Court of Appeals. The Court of Appeals had affirmed the longshoreman's judgment but had remanded the third party cause of action, exactly as in the case at bar (289 F.2d 201). After granting certiorari, this court reversed. Hence it is seen that certiorari under these circumstances may be granted to review a non-final judgment.

Point II. The Circuit Court of Appeals Erred in Searching the Record to Reverse the Jury Decision and Thereby Deprived Petitioner of Its Seventh Amendment Rights.

The usual reluctance of this Honorable Court to review factual issues has a well-established exception in maritime cases. Although often exercised in favor of the harbor worker, this exception is not limited to that class of litigants nor to F.E.L.A. cases.

In *A. & G. Stevedores* v. *Ellerman Lines, supra,* in reversing the Court of Appeals whose judgment had nullified the effect of the jury's verdict in favor of the stevedore, as in this case, the Supreme Court wrote (pages 358-359 of 369 U.S.):

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'."

International Terminal Operating Co., Inc. v. *N. V. Nederl. & Amerik,* 393 U.S. 74 also concerned a Court of Appeals reversal of a jury verdict in favor of the stevedore. The U. S. Supreme Court granted certiorari and at the same time, in a Per Curiam opinion, reversed, in order to reinstate the effect of the verdict.

Supreme Court Practice, by Stern & Gressman (Fourth Ed., 1969) at page 166 adverts to the United States Supreme Court's "present strong aversion toward appellate reversals of jury verdicts".

In that same text, it is further expressed thus, at page 174:

> "A large class of such cases, over which there has been substantial disagreement within the Court, is that in which the Court has held that evidence was sufficient to support a jury verdict for the plaintiff and that, therefore, the lower court decision withholding the case from the jury or setting aside the jury's verdict deprived the plaintiff of the right to a jury decision. Although most of these cases have arisen under the Federal Employer's Liability Act or the Jones Act (which extends the FELA to maritime injuries), *Gibson* v. *Phillips Petroleum Co.,* 352 U.S. 874, was a diversity suit for personal injuries suffered in an accident, and *Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, was a diversity suit on an insurance policy in which the question was whether the insured had committed suicide."

At page 175, the Authors continue:

> "The same viewpoint is reflected in *Beacon Theatres* v. *Westover,* 359 U.S. 500, 501, where the Court granted certiorari to review an interlocutory order in a civil antitrust case that would otherwise have permitted trial of a major issue in equity by the court sitting without a jury because, quoting from *Dimick* v. *Schiedt,* 293 U.S. 474, 486:
>
> > "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

And at pages 176-177, this important principle is enunciated by these authorities:

> "As long as the present policy of the Court with respect to this class of cases is adhered to by a majority of the Justices, the general principles the Court otherwise applies in not granting certiorari merely to review evidence or to determine if a case should have been submitted to a jury must be regarded as, to a considerable extent, inapplicable when the statutory or constitutional right to decision by a jury is in issue."

The jury's verdict had ample evidentiary support. A reading of 8 pages of the record* reflects testimony of two

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* These pages are Appendix pages 23, 33, 39, 40, 46, 55, 57 and 58. Utilizing the permissive clause in Sup. Ct. Rule 21. 1.,

co-workers and of plaintiff himself negating contributory negligence. Plaintiff was performing his work in the correct way and paying attention. The accident occurred fast and without warning because of the failure of the ship's winch.

Petitioner refers to this testimony NOT to attack the weight of the evidence, but to demonstrate there was ample proof to support the jury's verdict rendered in petitioner's favor. Despite this ample proof, the Court of Appeals impermissibly searched the record for a view of the evidence that would take away petitioner's verdict, stating (to quote the opinion herein),

> "it is entirely possible that the jury found the longshoreman contributorially negligent";

and also that,

> "the jury might have found that the plaintiff longshoreman was contributorially negligent."

Petitioner urges this is error.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943), the Appellate Court had set aside a verdict after finding there was no evidence upon which to base the jury's inferences. In reversing, the Supreme Court wrote at pages 34-35:

> "In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. . . . .

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petitioner has certified the Appendix which has been transmitted to this Court. Certification of only 8 pages was requested but the Clerk deemed it more convenient to certify the entire Appendix.

> • • • These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no presumption in their favor exists. *Nor can any possible assumption of risk or contributory negligence on Tennant's part be presumed* in order to negate an inference that death was due to respondent's negligence.
>
> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. • • • That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.
>
> Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial." (Emphasis added and citations omitted.)

In *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, the issue was whether an insured died as a result of suicide or accident. The court wrote at pages 445-446:

> "In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent. . . ."

See also *Arnold* v. *Panhandle & Santa Fe R. Co.*, 353 U.S. 360, holding that the Supreme Court cannot accept interpretations of the evidence that nullify a party's right under federal law to a jury trial; and *A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355, stating that a search for one possible view of the case which will make a jury finding inconsistent results in a collision with the Seventh Amendment.

The Court of Appeals' misapprehension in the case at bar similarly relates to the matter of "conduct precluding indemnity" we respectfully contend. The opinion stated that if it knew that was the jury's finding it could avoid a new trial. However, this is not the test. Under *Tennant, supra,* the test is whether there was evidence in the record to support a finding that there was conduct precluding indemnity. The record indeed reflects such evidence as the Court pointed out at page 3 of the opinion, *i.e.*, that the winchman was signalled by the crew to resume operations. This was held to be conduct precluding indemnity by this same court in *Hudson Steamship Co.* v. *Ayala Colon,* 314 F.2d 44, affirming *Torres Cruz* v. *Hudson Steamship Co.*, 206 F. Supp. 216 (D.C.P.R.).

Therefore even if contributory negligence had been found, there was sufficient evidence of conduct precluding indemnity. This brings us back to the *Tennant* doctrine that the view of the evidence leading to an affirmance of

the jury result is the view that must be taken. Otherwise the Seventh Amendment's constitutional rights have been violated.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit; and, upon review, the jury verdict and the district court judgment thereon, reinstated.

Respectfully submitted,

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Counsel for Petitioner

September 15, 1975

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO
Civil 175-70

RUBEN SANTIAGO MARTINEZ
Plaintiff,
—against—
COMPAGNIE GENERALE TRANSATLANTIQUE,
Defendant and
Third-Party Plaintiff,
—against—
FRED IMBERT, INC.,
Third-Party Defendant.

MEMORANDUM DECISION DENYING
APPELLANT'S POST-TRIAL MOTIONS
(Filed and entered August 13, 1974)

I. *History of the Litigation*

Plaintiff was a longshoreman and an employee of Fred Imbert, Inc., the stevedore. He was injured while working on defendant's vessel, the Fort Desaix. Plaintiff suffered back and shoulder injuries and psychological trauma resulting in a conversion reaction causing the loss of his normal power of speech. Plaintiff sued, alleging that the vessel was unseaworthy and that the owner and crew were negligent. The defendant answered denying the allegations of unseaworthiness and negligence and alleged that contributory negligence on the part of the plaintiff caused the accident. Defendant also filed a third party complaint for indemnity against Fred Imbert, Inc., the stevedore, alleging that if negligence caused plaintiff's injuries, it was the negligence of the stevedoring company and its employees.

After a vigorously contested jury trial plaintiff was awarded a substantial verdict. The third party defendant was exonerated. The evidence was conflicting and turned largely on the credibility of the witnesses.

Defendant and third party plaintiff has moved for judgment notwithstanding the verdict or for a new trial. Plaintiff has moved for attorney's fees under the Puerto Rican doctrine of "obstinacy" and P.R.R.Civ.P. 44.4(d) and for pre-judgment interest under P.R.R.Civ.P. 44.4 (e). The third party defendant has also moved for attorney's fees because of obstinacy.

All the motions made by each party are denied.

II. *Motions of Defendant and Third Party Plaintiff*

There was ample evidence to support the plaintiff's version of the accident. There was sufficient evidence to support the amount of damages awarded. It is true that defendant and third party plaintiff forcefully brought contradictory evidence and impeaching evidence to the attention of the jury. The jury did not believe nor give weight to defendant and third party plaintiff's evidence.

Substantial time and effort was spent by the court and counsel for all parties in the consideration of the proposed instructions. It was and is the court's belief that the instructions given correctly stated the applicable law and afforded each side due process.

A general verdict was used in this case. No special interrogatories were submitted to the jury. No objection to this procedure was made at trial. The issues of negligence and unseaworthiness were both, under the evidence and applicable law, properly before the jury. The jury could have found damages were due plaintiff by virtue of defendant's negligence, the vessel's unseaworthiness or both. Defendant's assertion that he cannot now ascertain the basis for the verdict is not sufficient reason to overturn the verdict at this stage of the proceedings.

Defendant and third-party plaintiff's motions will be denied.

• • • • •

DONE BY THE COURT this 31st day of May, 1974.

CHARLES L. POWELL
United States District Judge

ORDER DENYING APPELLANT'S POST-TRIAL MOTIONS

A Memorandum Decision on the motions of defendant-third party plaintiff has been filed. For the reasons stated therein

IT IS ORDERED that the defendant's motions for judgment against plaintiff notwithstanding the verdict of the jury or in the alternative for a new trial be and they are DENIED, and

IT IS FURTHER ORDERED that the third party plaintiff's motion for judgment against the third party defendant or in the alternative for a new trial be and it is DENIED.

DONE BY THE COURT this 31 day of May 1974.

CHARLES L. POWELL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1353

RUBEN SANTIAGO MARTINEZ,
PLAINTIFF, APPELLEE,
v.
COMPAGNIE GENERALE TRANSATLANTIQUE,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT,
v.
FRED IMBERT, INC.,
THIRD-PARTY DEFENDANT, APPELLEE.

No. 74-1354

RUBEN SANTIAGO MARTINEZ,
PLAINTIFF, APPELLANT,
v.
COMPAGNIE GENERALE TRANSATLANTIQUE,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE,
v.
FRED IMBERT, INC.,
THIRD-PARTY DEFENDANT, APPELLEE.

No. 74-1355

RUBEN SANTIAGO MARTINEZ,
PLAINTIFF, APPELLEE,
v.
COMPAGNIE GENERALE TRANSATLANTIQUE,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE,
v.
FRED IMBERT, INC.,
THIRD-PARTY DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, MCENTEE and CAMPBELL,
Circuit Judges.

William M. Kimball, with whom *Jose L. Novas-Dueno*, *Hartzell*, *Ydrach*, *Mellado*, *Santiago*, *Perez & Novas*, and *Burlingham Underwood & Lord* were on briefs, for Compagnie Generale Transatlantique.
Charles A. Cordero for Fred Imbert, Inc.
Harvey B. Nachman, with whom *Nachman*, *Feldstein & Gelpi* was on briefs for Ruben Santiago Martinez.

May 29, 1975

MCENTEE, *Circuit Judge.* The familiar longshoreman-shipowner-stevedore triangle has led to the three appeals presented in this case. Plaintiff Santiago Martinez, employed as a longshoreman by Fred Imbert, Inc., was working in the hold of the M/V FORT DESAIX when he was struck and pinned by a moving pallet on November 9, 1968. He sued defendant Compagnie Generale Transatlantique, the shipowner, who in turn filed a third party complaint seeking indemnity from plaintiff's employer, Imbert (the stevedore). By a general verdict the jury awarded the longshoreman $90,000 and found for the stevedore in the indemnity action. The shipowner appeals from both judgments. In addition, the longshoreman appeals from the district court's denial of his motion to award attorney's fees and prejudgment interest against shipowner for obstinacy, and the stevedore also appeals the denial of an award for attorney's fees and other defense costs it incurred. We conclude that the indemnity action must be retried, but reject the other appeals.

The shipowner's first argument is that there was not sufficient evidence to allow the jury to find for the longshoreman. We disagree. The unloading on the ship was being done by a married winch operation. This required the use of two winches pulling against each other in synchronization to raise a pallet of cargo from the hold where the longshoreman was working. If one winch failed or was not operated

correctly, the cargo would plumb under the opposite winch. In the instant case the onshore winch stopped or did not start and thus allowed the full pallet of cargo to plumb under the offshore winch and pin the longshoreman. There was testimony that the same winch had stopped about two hours earlier, but no injury resulted. On both occasions a member of the ship's crew repaired the winch or replaced fuses and signaled the winchman to resume operations. The electric winches had separate control wheels, but one winchman operated both winches by sticks attached to the wheels for two and one-half hours and then was relieved by the other winchman.

On the unseaworthiness theory the shipowner essentially argues that the winch may have overloaded and blown a fuse because the winchman was confused as to which way to operate the winch or because the winchman accelerated the winch too rapidly. Even if a winchman was confused at trial as to which way to turn the winches in this married operation, that does not necessarily mean he was confused at the time of the accident years earlier. The important point is that both of these theories were presented to the jury under proper instructions, and the shipowner cannot reargue here that the ship was seaworthy because the evidence allowed an inference that the accident occurred because of a longshoreman's negligence with no more than instantaneous effect. *See Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971). The evidence does not compel that inference, and therefore we need say nothing more about this argument. Nor are we impressed by the argument that the evidence showed the winch "stopped," not that it "broke or failed." By this distinction the shipowner attempts to avoid the effect of *Greene* v. *Vantage S.S. Co.*, 466 F.2d 159, 163 (4th Cir. 1972): "Where an appliance or piece of equipment breaks or fails in the normal course of use, a plaintiff need not show why the failure occurred, but

only that it did occur with the resulting injury." But the jury could have found on the evidence that the winch did fail in the normal course of use. The last attack made on the unseaworthiness theory is that the ship would have been unseaworthy had a fuse not blown when it was overloaded, so the ship could not have been unseaworthy because a fuse blew. The defect in this argument is that the married winch operation may have required that a cutoff device stop both winches automatically if one failed. We are not prepared to say that a jury could not have applied the seaworthiness requirement.

Plaintiff's separate count for negligence created complications that we have had occasion to speak about before. As the instant charge illustrates, it is difficult enough to charge a lay jury in a seaman's case without adding what are not merely redundant questions, but the same questions over again in a more complicated form.

The court charged the jury with respect to the negligence count that plaintiff claimed the shipowner to have been negligent in four particulars:

> "(a) In failing to furnish the plaintiff with a reasonably safe place to work. (b) In failing to supply the plaintiff with a reasonably safe vessel and appliances. (c) in failing to provide a proper winch to remove the cargo. (4) In failing to properly supervise the discharging operations."

It must be apparent that the first three claims were fully and exactly covered by the seaworthiness count and the court's proper charge that proof as to any of them would impose unseaworthiness liability even though the shipowner was entirely without fault. No purpose is served by asking the jury to resolve the same issues again with the added requirement that there be affirmative proof of negligence. To paraphrase the Court in *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961), having established a hole in the

fence for one cat, there is no need to construct another hole for a second. We dealt with this question in *Peymann* v. *Perini Corp.*, 507 F.2d 1318, 1323 (1st Cir. 1974), *cert. denied*, 43 L.E.2d 780 (1975). where we pointed out that the negligence count was superfluous when it merely realleged the same defects that made the ship unseaworthy.

Here, it can have made no difference whether the court's charge with respect to negligence under items (a), (b) and (c) was sufficiently favorable to the shipowner, or whether the evidence warranted a finding of lack of due care on the shipowner's part. The charge was certainly no less favorable to the shipowner than was that on unseaworthiness, and both theories were submitted to the jury which returned, without objection, a general verdict. On this record we perceive no way in which the shipowner may have been prejudged.

The only additional matter alleged in the negligence count was item (d), failing to properly supervise the discharging operations. With respect to this, the court charged,

> "The shipowner has no duty to oversee, supervise or direct the methods by which or manner in which the stevedoring corporation and its employees perform the stevedoring services, but the shipowner must correct any dangerous condition if it is known or discovered by him."

After the charge, at the sidebar, the court stated that it had given this request of the shipowner inadvertently, as it was too favorable. On the shipowner's appeal we need not consider whether it was too favorable for certainly it was favorable enough. Nor do we see any conflict between this instruction and item (d), which was not stated to the jury as a ruling of law, but simply as what plaintiff claimed.

The court also charged that the shipowner might be denied indemnity if the jury found that the shipowner "by

the action of the mate or the crew member, acquiesced or consented to the continuance of the stevedore's conduct of which it now complains . . ." and the shipowner apparently objects that this contradicted the charge that it had no duty to supervise. We see no inconsistency. To allow denial of indemnity upon a finding that the shipowner approved of the stevedore's performance is not to impose liability upon a finding that the shipowner failed to disapprove of the stevedore's performance. Since the shipowner's single remaining objection to the charge in the longshoreman's action depends on quoting the charge out of context, we find no error there. Consequently, the judgment for the longshoreman is affirmed.

The longshoreman's appeal from the finding that the shipowner was not obstinate within the meaning of Puerto Rico Rules of Civil Procedure 44.4(d) and (e)* need not detain us long. By converse reasoning to that applied above, the shipowner had supportable claims either that it was not liable or that it was liable to only a small degree. The jury might have found that the winchman caused this accident by mishandling the winch, in which event *Usner* would have barred a finding of unseaworthiness. Or the jury might have found that the plaintiff longshoreman was contributorially negligent—by loading another pallet rather than standing out of the way during the lifting phase as he was required to. Since the first failure of this winch did not hurt anyone and should have alerted the longshoremen in

* These rules provide as follows:

"(d) Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees."

"(e) [Legal interest.] In all cases of money collection where the party has been obstinate the court shall impose on such person the payment of interest according to law, from the time in which there appeared cause of action and in case of damages, such payment of interest shall be imposed from the time the filing of the claim was made and computed on the amount of the judgment. . . ."

the hold not to unnecessarily expose themselves to danger, the jury could have assessed the proportionate contribution of such negligence at a high figure. The diagnosis of plaintiff's problem as "conversion reaction, chronic related" also produced substantial issues regarding the amount of damages. These considerations amply support the district court's denial of counsel fees and prejudgment interest.

We turn now to the indemnity issue. The shipowner objected to the following charge:

> "If a contributing cause of plaintiff's injury was his own negligence, that is a factor to be considered by you in determining whether the stevedore has breached its warranty to the shipowner and [if] after considering all the evidence in the case you find that the stevedore has breached its warranty, then the shipowner would be entitled to recover indemnity from the stevedore."

Its claim is that the jury should have been charged that "If a contributing cause of plaintiff's injury was his own negligence, then the shipowner would be entitled to recover indemnity." Another portion of the charge adequately covered the discrete issue of whether shipowner was precluded from recovering indemnity by conduct on its part, *see Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 (1958), so that issue is not involved here. This dispute is whether a longshoreman's contributory negligence automatically establishes breach by the longshoreman's employer of its warranty of workmanlike performance. In the Fifth Circuit it appears that contributory negligence by a longshoreman does not necessarily amount to breach of warranty by the stevedore. Instead, the longshoreman's contributory negligence is regarded as one consideration in determining whether the stevedore breached its warranty. *See Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 479 F.2d 432, 433 (5th Cir.), *cert. denied sub nom. Mitsui O.S.K.*

Lines, Ltd. v. *Strachan Shipping Co.*, 414 U.S. 1093 (1973); *D/S Ove Skou* v. *Hebert*, 365 F.2d 341, 350 (5th Cir. 1966), *cert. denied sub nom. Southern Stevedoring & Contracting Co.* v. *D/S Ove Skou*, 400 U.S. 902 (1970); *Lusich* v. *Bloomfield S.S. Co.*, 355 F.2d 770, 778 (5th Cir. 1966). It appears that the Third Circuit accepts this approach also. *See Shaw* v. *Lauritzen*, 428 F.2d 247 (3d Cir. 1970). In the Second, Fourth, and Ninth Circuits the rule is that contributory negligence by the longshoreman within the scope of his employment is imputed to the stevedore. *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1336-37 (2d Cir.), *cert. denied sub nom. Golten Marine Co.* v. *Trelleborgs Angfartygs A/B*, 395 U.S. 946 (1969); *Nicroli* v. *Den Norske Afrika-Og Australielinie*, 332 F.2d 651, 656 (2d Cir. 1964); *Damanti* v. *A/S Inger*, 314 F.2d 395, 399 (2d Cir.), *cert. denied sub nom. Daniels & Kennedy, Inc.* v. *A/S Inger*, 375 U.S. 834 (1963); *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F.2d 26, 28 (4th Cir. 1971); *Arista Cia. DeVapores, S/A* v. *Howard Terminal*, 372 F.2d 152, 154 (9th Cir. 1967). This also may be the rule in the Sixth Circuit. *See Turner* v. *Global Seas, Inc.*, 505 F.2d 751, 756-57 (6th Cir. 1974). We have recently held that "a stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence. . . ." *Carrillo* v. *Sameit Westbulk*, No. 74-1204 (1st Cir., April 14, 1975). In light of that well-settled rule it is difficult to argue that a stevedore has not breached its warranty where it turns out that one of its employees was negligent within the scope of his employment. We believe the correct rule is that the plaintiff longshoreman's negligence must be imputed to his employer as a basis for indemnity. Of course, this does not mean that a finding of contributory negligence automatically establishes the shipowner's right to indemnity. The fact finder may still find that there was conduct by the shipowner sufficient to preclude indemnity. *See generally Hurdich* v. *Eastmount Shipping Co.*, 503 F.2d 397 (2d Cir. 1974).

On the evidence and the charge in this case, coupled with the general verdict, it is entirely possible that the jury found the longshoreman contributorially negligent. Accordingly we are compelled to reverse the judgment for the stevedore and remand for a new trial. It is no answer that the jury may have found that the shipowner's conduct in providing a defective winch was conduct precluding indemnity. If we knew that was their finding, we could avoid a new trial, but we cannot speculate that the error in the charge did not prejudice the shipowner. This posture evidences once again the usefulness of the procedure authorized in Fed. R. Civ. P. 49(b). If this case had been submitted to the jury for a general verdict accompanied by answers to appropriately phrased interrogatories, the needless waste of a new trial could have been avoided. The debate between the parties over who should bear responsibility for this shortcoming is somewhat shortsighted. Some measure of the blame for not requesting such a submission must be laid at the shipowner's feet, but an equal measure must be assigned to the stevedore. And of course the court itself would have been well-advised to utilize this procedure.

The remaining issue is the stevedore's appeal. It argues that the shipowner was obstinate in not conceding unseaworthiness and in not being sufficiently receptive to settlement negotiations. Reliance is placed on *Rivera* v. *Rederi A/B Nordstjernan*, 456 F.2d 970 (1st Cir. 1972), where the imposition of attorney's fees for obstinacy was upheld against the shipowner even though that party prevailed in the third party action. But this case is not analogous to *Rivera*. It upheld imposition of attorney's fees for the benefit of the plaintiff longshoreman, not for the stevedore. *Rivera* also implicitly recognized that obstinacy in defend-

ing against a plaintiff does not necessarily establish obstinacy in claiming indemnity from a third-party defendant. *See id.* at 975 n. 11. Even if we had decided the appeal of the indemnity action differently, the facts of this case would not support a finding of obstinacy against the shipowner and in favor of the stevedore. We need not reach the stevedore's remaining point, that it is entitled to counsel fees and other defense costs from the shipowner for its breach of its warranty to the stevedore, since that question has been mooted by our reversal in the indemnity action.

The judgment for the plaintiff longshoreman is affirmed; the denial of his motion for an obstinacy award is also affirmed; the judgment for the stevedore is reversed and that case is remanded for a new trial; and the appeal of the stevedore is dismissed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1353.

RUBEN SANTIAGO MARTINEZ,
PLAINTIFF, APPELLEE,
v.
COMPAGNIE GENERALE TRASATLANTIQUE,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT,
v.
FRED IMBERT, INC.,
THIRD-PARTY DEFENDANT, APPELLEE.

No. 74-1354.

RUBEN SANTIAGO MARTINEZ,
PLAINTIFF, APPELLANT,
v.
COMPAGNIE GENERALE TRASATLANTIQUE,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE,
v.
FRED IMBERT, INC.,
THIRD-PARTY DEFENDANT, APPELLEE.

No. 74-1355.

RUBEN SANTIAGO MARTINEZ,
PLAINTIFF, APPELLEE,
v.
COMPAGNIE GENERALE TRASATLANTIQUE,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE,
v.
FRED IMBERT, INC.,
THIRD-PARTY DEFENDANT, APPELLANT.

JUDGMENT
Entered May 29, 1975

This cause came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment for the plaintiff longshoreman is affirmed, and the denial of his motion for an obstinacy award is also affirmed;

The judgment for the stevedore Fred Imbert, Inc., is vacated and the cause is remanded for a new trial thereon; and

The appeal of the said stevedore is dismissed.

No costs.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

[cc. Messrs. Kimball, Nachman and Cordero.]

UNITED STATES COURT OF APPEALS
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v.

FRED IMBERT, INC.,
THIRD-PARTY DEFENDANT, APPELLEE.

Before ALDRICH, MCENTEE, and CAMPBELL,
Circuit Judges.

ORDER OF COURT
Entered June 20, 1975

It is ordered that the petition for rehearing filed on June 12, 1975, be and the same hereby is, denied.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

[cc. Messrs. Kimball, Nachman and Cordero.]